IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 334 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE

HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AFZALKHAN @ BABU MURTUZAKHAN PATHAN - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR SV RAJU Ld. Sr. ADVOCATE WITH MR JAYPRAKASH UMOT

for Appellant(s) : 1,
MR LR PUJARI Ld. APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : /09/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The present appeal is preferred under sec. 34 of the Prevention of Terrorism Act, 2002 (hereinafter referred to as the 'POTA' for short), against the order rejecting the bail passed in Criminal Misc. Application No. 3964/2004 in POTA Case No. 12/2003 for the offences punishable under sec. 120B, 121, 122, 123 of IPC and under sec. 3(1) a, b, section 3(3), 4, 20. 21(2)(b) and sec. 22(2) of the POTA. The appellant came to be arrested on 15.7.2003 and since then he is in judicial custody. The ld. Advocate representing the appellant has submitted that on earlier occasion, the appellant preferred Criminal Misc. Application No. 1547/2004, which was rejected by the ld. Special Judge, POTA. The appellant, thereafter, preferred an appeal being Criminal Appeal No. 1289/2004 before this Court and this Court, by an order dated 9.12.2004 remanded the matter back to the ld. Special Judge (POTA) permitting the appellant to raise all the contention which were not raised before the ld. Special Judge (POTA). Further direction was also issued by the High Court to the ld. Judge to dispose of the said application within a period of three weeks. The appellant, accordingly moved an application for regular bail before the ld. Special Judge, (POTA), Ahmedabad being Criminal Misc. Application NO. 3964/2004, which came to be rejected by an order dated 5.1.2005. Being aggrieved by the aforesaid order passed by the ld. Special Judge (POTA), the appellant has preferred the present appeal under sec.

34 of the POTA for releasing him on regular bail.

2. As per the prosecution case, some time in the month of April, 2003, Joint Commissioner of Police, Crime Branch, Ahmedabad, received certain information through the Intelligence Agencies that after the Godhra massacre, certain youths of Ahmedabad city had gone to take training at Pakistan to terrorise the people of Hindu community and with a view to take revenge for the loss of lives and properties caused to the Muslim community. As per the prosecution case, the present appellant who is one of the conspirator of the said conspiracy which was hatched along with the other accused to strike terror in the Hindu community, but the appellant had withdrawn himself and never went to Pakistan. The name of the appellant does not figure in the FIR. The charge-sheet was submitted on 10.9.2003 by the Investigating Agency in the Court of Learned Special Judge (POTA) against the accused. The appellant has been shown as original accused no. 6 as per the charge-sheet. The ld. Advocate submitted that while deciding the application for bail, the ld. Special Judge (POTA) has not taken in to account the material which was placed on the record of the case in proper perspective. Even as per the charge-sheet submitted by the Investigating Agency, there was no iota of evidence to connect the appellant with the crime in question and as the FIR does not even reveal the name of the appellant, the ld. Special Judge (POTA) ought to have held that the appellant was falsely implicated in the commission of crime and, therefore, he is entitled to be enlarged on bail. The ld. Judge

ought to have taken into consideration the policy adopted by the Investigating Agency of pick and chose and released the appellant on bail because the appellant on the basis of the same material has been cited as a witness in the case of killing of Ex-Home Minister Shri Haren Pandya, which came to be registered as POTA Case No. 10/2003. The ld. Advocate submitted that in Special POTA Case No. 7/2003 and 8/2003 popularly known as Tiffin Bomb cases, the appellant was discharged by the ld. Special Judge (POTA). The ld. Judge has not appreciated the confessional statements of (1) Mahmadparvez Abdulkaiyub Shaikh; (2) Mahmadyunus Abdulrahim Sareswala; (3) Mohmed Riyaz @ Goru Abdulwahib Sareswala; (4) Rehan Abdulmajeed Puthawala; (5) Muawarbeg alias Captain Yakubbeg Mirza; (6) Kalim alias Mulla Karim and (7) Anas Abdul Machiswala which were recorded under sec. 32 of the POTA in proper perspective. As per the confessional statement of the above mentioned witnesses, the appellant was to go for taking training at Pakistan but he could not go to Pakistan due to personal reasons. Taking into account the confessional statements of the witnesses recorded under sec. 32 of the POTA, it becomes clear that appellant has not played any role in the alleged conspiracy and as there was no prima facie case against the appellant indicating his involvement in the offence, the ld. Judge ought to have enlarged the appellant on bail. The ld. Advocate further submitted that the appellant is in jail since 15.4.2003 and the ld. Special Judge (POTA) has released on regular bail the co-accused namely (1) Mohmed Manzoor Mohmed Siraj Siddiqui by an order dated 9.12.2004 passed in

Criminal Misc. Application No. 3067 of 2004 and (2) Abdul Samad Mohmed Ibrahim by order dated 16.9.2004 passed in Criminal Misc. Application No. 2220/2004, and, therefore, even on the ground of parity, the appellant is required to be enlarged on regular bail. The ld. Advocate further submitted that provisions of sec. 3 and 4 of POTA cannot be invoked against the appellant. The possession of the weapon which was recovered has not been prima-facie established in the present case and, therefore, it would not be attracted so as to rope in the appellant. As the prosecution has not made out a case, the offence under sec. 3 as well as 4 of the POTA cannot be invoked against the appellant in the facts and circumstances of the case. Thus, ld. Advocate submitted that taking into account the material available with the Investigating Agency, it is a fit case to enlarge the appellant on regular bail on the terms and conditions which this court may deem fit.

3. Ld. Advocate for the appellant has placed reliance on the following judgments in support of the submissions canvassed at the Bar, which are as under:

1) **Dharani Pradhan Vs. State**
   1997 Cri.L.J. 2973
2) **Puran Lal Vs. State of U.P.**
   1997 Cri.L.J. 3813
3) **Anter Singh Vs. State of Rajsthan**
   (2004)10 SCC 657
4) **The judgment rendered in Criminal Misc. Application No. 900/2001 as well as 5483 & 5596**

of 2000.

4. Learned APP Mr. LR Pujari representing the State submitted that the present appeal filed by the appellant is a successive bail application. On earlier occasion, the application for bail was preferred before the ld. Special Judge (POTA) and the same was rejected. Aggrieved by the said order, the appellant preferred an appeal before this court and the matter was remanded back to the ld. Special Judge (POTA), to consider the same on merits. Thereafter, the application being Criminal Misc. Application NO. 3964/2004 was preferred which was decided by the ld. Special Judge (POTA) and aggrieved by the said order, the appellant has preferred the present appeal under sec. 34 of the POTA. Ld. APP submitted that there is apparently no change in the circumstances which would warrant any interference by this court. Learned APP submitted that while deciding the bail application, the ld. Special Judge (POTA) has taken into consideration the statements recorded under sec. 32 of the POTA as well as the involvement of the appellant in the commission of crime. Learned APP submitted that one automatic pistol made in U.S.A., one katta (country made Pistol) with one live cartridge and another katta (country made Pistol) were seized from the appellant and the panchanama in respect thereof was also prepared and the same is produced along with the papers of charge-sheet. Thus, when a serious involvement of the appellant is prima-facie established and he is found in possession of the arms and ammunition, he is not entitled to be enlarged on regular bail and, therefore, the appeal

preferred by the appellant is liable to fail and the same may be dismissed. Learned APP has placed reliance on the following decisions in support of his submissions canvassed at the Bar, which are as under:

1) **Kalyan Chandra Sarkar s. Rajesh Ranjan @ Pappu Yadav & Anr.**
   (2004)7 SCC 528
2) **State of Maharashtra Vs. Sitaram Popat Vetal & Anr.**
   (2004)7 SCC 521

5. We have heard Mr. SV Raju, learned Sr. advocate for the appellant and Mr. L. R. Pujari, learned Additional Public Prosecutor for the appellant-State at length and in great detail. This court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record.

5. We have considered the submissions canvassed by both the sides and also perused the material placed before us as well as the statement of the accused which was referred to and relied upon by both the sides. We have also perused the detailed order passed by the ld. Special Judge (POTA) in Criminal Misc. Application No. 3964/2004 and the reasons assigned by the ld. Special Judge (POTA) while rejecting the bail application of the appellant. If we take into account the evidence which is against the appellant in the present case, there is a discovery panchnama produced along with the papers of charge-sheet which points at the discovery of the weapons and large number of

cartridges from the accused and as there was notification under sec. 4 of the POTA prevailing at the relevant time in the entire State of Gujarat, the discovery of the weapons with large number of cartridges itself would be sufficient for the court to hold prima-facie case against the appellant. Learned advocate for the appellant has placed reliance on sec. 3 as well as sec. 4 of the POTA in order to indicate that the discovery of the weapons and cartridges was made by the Investigating Agency when it was shown to them by the appellant, and, therefore, the appellant cannot be said to be in possession of the arms and ammunition within the meaning of sec. 3 of the POTA. When the appellant is not found in possession of the arms and ammunition than the provisions of sec. 4 of the POTA cannot be invoked. But, on bare perusal of the panchnama along with the other relevant material placed for our consideration, that is the, statements of the accused and other persons recorded under sec. 32 of the POTA, as the weapons and cartridges were recovered at the instance of the appellant, he can prima-facie be said to have the knowledge and since the possession of the weapons and cartridges is shown by the Investigating Agency, the provision of sec. 3 of the POTA can be invoked against the appellant and as per our discussion hereinabove, since the discovery of weapons and cartridges was made in an area where the notification under sec. 4 of the POTA was in force,sec.4of the POTA was also,in our view, rightly invoked against the appellant. The contention raised by the ld. Advocate for the appellant that since two accused who were granted bail in Criminal Misc.

Application No. 3067/2004 and 2220/2004, therefore, the case of the appellant be considered at par with those two accused, is devoid of merit as the present appellant cannot in view of the discovery of weapons and ammunition and other corroborative evidence in the matter claim parity with two other accused who were released on regular bail by the ld. Special Judge (POTA). The rule of parity, in our view, can only be applied in a case where not only the role of particular accused is found to be similar with another but circumstances of the accused and other relevant factors are particularly at par with each other. In view of the aforesaid facts and circumstances, submissions made by the ld. Advocate for the appellant is hereby rejected. With regard to the statements of the appellant under sec. 32 of the POTA and the statements of co-accused Mohmed Parvez Abdulkayum Shaikh, Mohmed Riyaz and Munawarbeg under sec. 32 of the POTA, the same in our view,is to be read along with other corroborative evidence relied upon by the prosecution and even if the confessional statement under sec. 32 is not looked into by this court,than also there is sufficient material or evidence in the form of discovery panchnama and the weapons which were discovered at the instance of the appellant and the court cannot be oblivious to the aforesaid discovery of the weapons and ammunitions from the appellant.

7. In view of the foregoing discussion, the appeal preferred by the appellant is devoid of merits and it is liable to fail. Hence, we pass the following order:

8. The appeal fails and it is dismissed.

(A.R. DAVE, J.)

(H.B. ANTANI, J.)

mandora/